MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DANIEL HENDRICKS and KATHERINE HENDRICKS,

Appellants,

v.

THE CURATORS OF THE UNIVERSITY OF MISSOURI, et al.,

Respondents.

DOCKET NUMBER WD70398

Date: April 27, 2010

Appeal from:
Boone County Circuit Court
The Honorable Kevin M. J. Crane, Judge

Appellate Judges:
Division One: Lisa White Hardwick, P.J., James M. Smart, Jr. and Alok Ahuja, JJ.

Attorneys:
Kathleen A. McNamara, Esq., and Frederick G. Thompson, IV, Esq., Kansas City, MO, for appellant.
Susan F. Robertson, Esq., Kansas City, MO and Wade H. Ford, Jr., Esq., Columbia, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

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Before Division One Judges: Lisa White Hardwick, P.J., James M. Smart, Jr. and Alok Ahuja, JJ.

Plaintiffs-Appellants Daniel and Katherine Hendricks filed a petition seeking damages from the Curators of the University of Missouri, among others, for alleged negligence relating to medical care provided to Daniel Hendricks when he was a patient at the University Hospital in Columbia. The circuit court dismissed the Hendrickses' claims against the Curators on the basis of sovereign immunity. The Hendrickses appeal, arguing that the Curators waived sovereign immunity by adopting a self-insurance plan which provides coverage for the Hendrickses' claims.

AFFIRMED.

Division One holds:

Section 537.610.1, RSMo, provides that a public entity may waive sovereign immunity for tort claims by the purchase of liability insurance, or the adoption of a self-insurance plan, to the extent of the coverage provided in the insurance policy or self-insurance plan.

Here, the Curators had a self-insurance plan in place which arguably provided coverage for the type of injuries alleged by the Hendrickses. The self-insurance plan also provided, however, that "[n]othing in the Plan shall be construed as a waiver of any governmental immunity of the [Curators]." Prior cases have held that a governmental entity can avoid any waiver of sovereign immunity which might otherwise result from its purchase of liability insurance, where its insurance

policy expressly states that the policy does not effect a waiver of sovereign immunity. We applied that principle to the very self-insurance plan at issue here in *Langley v. Curators of the University of Missouri*, 73 S.W.3d 808 (Mo. App. W.D. 2002).

Langley requires affirmance here. We reject the Hendrickses' arguments attempting to avoid *Langley*'s precedential effect. First, the language in *Langley* interpreting the self-insurance plan was not non-binding *dicta*. Although *Langley* involved primarily the interpretation of a separate excess liability insurance policy possessed by the Curators, if the self-insurance plan had itself waived the Curators' sovereign immunity, it would have been unnecessary to even address the effect of the excess policy. Further, the excess policy incorporated the terms of the self-insurance plan, making construction of the self-insurance plan necessary to interpretation of the excess policy.

We also reject the Hendrickses' argument that *Langley* was incorrectly decided. The non-waiver provision of the self-insurance plan is not limited to actions taken by the Curators "in the course of their official duties." Moreover, the non-waiver provision does not render the policy's coverage clause wholly meaningless and thereby create an ambiguity, because – even if the Curators' sovereign immunity is preserved – the policy still provides meaningful coverage in other situations.

Finally, the trial court did not improperly treat the Curators' motion to dismiss as a motion for summary judgment, because the court's ruling only referred to the Hendrickses' Petition and the attachments to the Petition, not to any other, extrinsic evidence. In ruling on the Curators' Motion to Dismiss, the court was not required to accept as true the allegation in the Hendrickses' Petition that the Curators had waived their sovereign immunity, because that was a legal conclusion, not an allegation of fact.

Opinion by: Alok Ahuja, Judge April 27, 2010